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NOTES

DUE PROCESS RIGHTS OF MENTALLY ILL PARENTS IN NONCONSENSUAL ADOPTIONS

Persons afflicted with mental illness are, during their confinement in an institution, unable to care for their children. Statutory provisions for the adoption of these children, irrespective of the wishes and without regard for the prognosis of the mentally diseased parent, have been enacted in many states.¹ The absolute permanence of adoption² and the increasing impermanence of mental illness³ posit a query as to the degree

1. ALA. CODE tit. 27, § 3 (1940); ARIZ. CODE ANN. § 27-203 (Supp. 1952); ARK. STAT. ANN. § 56-106 (1947); DEL. CODE ANN. tit. 13, § 1104 (Supp. 1954); GA. CODE ANN. § 74-404 (Supp. 1951); ILL. ANN. STAT. tit. 19, § 19.012(10 1/2) (Supp. 1953); IOWA CODE ANN. § 600.3 (Supp. 1954); KY. REV. STAT. § 199.500 (1953); ME. REV. STAT. c. 158, § 37 (1954); MASS. ANN. LAWS c. 210, § 3 (Supp. 1953); MICH. COMP. LAWS § 710.3 (1948); MINN. STAT. ANN. § 259.24 (West Supp. 1954); MISS. CODE ANN. § 1269 (1942); MO. ANN. STAT. § 453.040 (Vernon 1949); NEV. COMP. LAWS § 9478 (Supp. 1941); N.J. REV. STAT. § 9:3-24 (Supp. 1953); N.Y. DOM. REL. LAW § 111; N.C. GEN. STAT. § 48-9 (Supp. 1953); N.D. REV. CODE § 14-1104 (Supp. 1953); OHIO REV. CODE § 3107.06 (1954); ORE. COMP. LAWS ANN. § 109.320 (1940); PA. STAT. ANN. tit. 1, § 2 (Supp. 1954); R.I. GEN. LAWS c. 420, § 3 (1938); S.D. CODE § 14.0403 (1939); TENN. CODE ANN. § 9572.21 (Williams Supp. 1952); WASH. REV. CODE § 26.32.040 (1951); W. VA. CODE ANN. § 4755 (1949); WYO. COMP. STAT. ANN. § 58-211 (1945).

2. "Adoption, which affects the course of inheritance, deprives the child of a place in which it was placed by nature, and by force of law thrusts the child into another relationship, while severing forever and conclusively the legal rights and interests of the natural parents, and is a very different matter from a change of custody, which could be on a temporary basis." *Jackson v. Russell*, 342 Ill. App. 637, 639, 97 N.E.2d 584, 585 (1951). If there was notice and a lack of fraud the only means by which an adoption decree may be vacated is by a demonstration of a failure to comply with the procedural requirements of the statute. See Note, 61 YALE L.J. 591 (1952).

3. Dr. Daniel Blain, medical director of the American Psychiatric Association, testifying before the House Interstate and Foreign Commerce Committee, predicted "that the time would come soon when 'the great majority of the mentally ill can be treated and returned to the community in a relatively short period of time.'" N.Y. Times, March 10, 1955, p. 49, col. 1. Significant advances have recently been made in the development of drugs for the treatment of mental illness. Two drugs, chlorpromazine and reserpine, have produced noteworthy results in the treatment of various disorders. By the use of reserpine, in a seven month survey, "patients have undergone a metamorphosis from raging, combative, unsociable persons to cooperative, friendly, cheerful, sociable, relatively quiet persons who are amenable to psychotherapy and rehabilitative measures." Noce, Williams, and Rapaport, *Reserpine in the Management of the Mentally Ill and Mentally Retarded*, 156 J. AM. MED. ASS'N. 821, 822 (1954). "[W]e expect it [reserpine] to revolutionize and facilitate modern psychiatric treatment." *Id.* at 823. Similar results have been obtained with the use of chlorpromazine. Lehman and Hanrahan, *Chlorpromazine—New Inhibiting Agent for Psychomotor Excitement and Manic States*, 71 AM. MED. ASS'N. ARCH. NEUROL. & PSYCHIAT. 227 (1954). Apparently referring to these, Dr. Winfred Overholser, Superintendent of St. Elizabeth's Hospital, D.C., declared, "there are very interesting new drugs coming

of seriousness of the parental affliction which should be required to sustain such nonconsensual adoption. In both denoting such a standard and formulating procedures for its effectuation, the states have manifested an eminent disinterestedness in protecting the rights of mentally ill parents.

Problems created by mental illness occur in various phases of law, but the resolution of none is so final in its effect upon the afflicted person as adoption.⁴ An adoption is much more than a mere shift of custody of a child from one family to another. It is a permanent alteration which affects the right of inheritance⁵ and the name⁶ of the child; since adoption proceedings are kept secret⁷ the natural parents may not even know who has possession of their child. Custody proceedings are temporary, affecting neither the child's inheritance nor his name.⁸

along . . . They are not a panacea, but I believe we are on the verge of a new era in drugs." N.Y. Times, March 9, 1955, p. 48, col. 3. Another development in psychotherapy, introduced in 1955, is a process called chemopallidectomy. It is a new form of brain surgery utilizing chemicals in place of the knife. N.Y. Times, March 5, 1955, p. 17, col. 1.

4. Questions arise as to the capability of mentally ill persons to enter contracts, to commit torts and crimes, to sue, and to serve as witnesses. There is also a problem as to the sufficiency of mental illness as ground for divorce. Even involuntary commitment in a mental institution has not the permanent effect of adoption since commitment is only until recovery. See, e.g., ARIZ. CODE ANN. § 8-307 (Supp. 1952); MASS. ANN. LAWS c. 123, § 89 (1949); N.Y. MENT. HYG. LAW § 87; NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL § 15 (Public Health Service Pub. No. 51, rev. ed. 1952). For a concise treatment of problems arising as a result of mental disease, and their resolution in the law, see 5 VERNIER, AMERICAN FAMILY LAWS §§ 301-311 (1936). One determination of mental status, that involved in sterilization of mental deficients, has results as permanent as those in adoption. See note 78 *infra*.

5. In some states the child may inherit through both the adoptive and the natural parents. See, e.g., ALA. CODE tit. 27, § 5 (1940); FLA. STAT. ANN. § 72.22 (Supp. 1953); IND. ANN. STAT. § 3-121 (Burns 1933); KY. REV. STAT. § 199.530 (1953); MASS. ANN. LAWS c. 210, § 7 (1933); N.Y. DOM. REL. LAW § 115. Many states permit inheritance only through the adoptive parents. See, e.g., ARIZ. CODE ANN. § 27-207 (Supp. 1952); DEL. CODE ANN. tit. 13, § 920 (1953); GA. CODE ANN. § 74-414 (1951); IOWA CODE ANN. § 600.6 (Supp. 1953); MINN. STAT. ANN. § 259.29 (West Supp. 1954); MO. ANN. STAT. § 453.080 (Vernon 1949). The general rule that children may inherit through their adoptive parents is discussed in 4 VERNIER, AMERICAN FAMILY LAWS § 262 (1936).

6. It is commonly provided that the adopted child take the name of the adoptive parent. See, e.g., ARIZ. CODE ANN. § 27-207 (Supp. 1952); GA. CODE ANN. § 74-404 (Supp. 1951); MINN. STAT. ANN. § 259.06 (West 1947); MO. ANN. STAT. § 453.080 (Vernon 1949); N.Y. DOM. REL. LAW § 114.

7. ALA. CODE tit. 27, § 5 (1940); IOWA CODE ANN. § 600.9 (Supp. 1954); KY. REV. STAT. § 199.570 (1953); ME. REV. STAT. c. 158, § 39 (1954); MICH. COMP. LAWS § 711 (1948); MO. ANN. STAT. § 453.120 (Vernon 1949); N.J. REV. STAT. § 9:3-31 (Supp. 1953); PA. STAT. ANN. tit. 1, § 4 (Supp. 1954); TENN. CODE ANN. § 9572.38 (Williams Supp. 1952); WASH. REV. CODE § 26.32.150 (1951).

8. See note 15 *infra* and accompanying text for a comparison of adoption and custody proceedings.

The early adoption statutes⁹ were voluntary, the consent of the natural parents being required for a valid adoption.¹⁰ However, it has been widely enacted that parental consent to an adoption may be obviated by parental behavior deleterious to the welfare of the child.¹¹ By such conduct the parent is said to forfeit his right.¹² The public interest which engendered such a policy of adoptions against the will of the parent is clear from the cases; the enactments are social legislation seeking to protect the welfare of children and to prevent them from becoming wards of the state.¹³ The cases generally recognize as essential an element of willfulness in such parental conduct, as in abandonment, neglect, or cruelty.¹⁴ A custody proceeding requires no such volitive behavior and may be sustained on the ground of poverty, illness, or other misfortunes which are clearly an

9. The history of adoption, as an institution, is ancient. It dates back to pre-Biblical times and has become a part of the law of most of the continental countries. Although custody proceedings were familiar in equity, adoption is not a part of the Common Law of England or the United States and is in those systems entirely statutory. The first adoption statute in the United States was enacted by Massachusetts, Mass. Acts 1851, c. 324, §§ 1-8. England had no such provision until 1926. Adoption of Children Act, 1926, 16 & 17 Geo. 5, c. 29. For an exhaustive treatment of adoption in ancient and civil law see Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922).

10. Mass. Acts 1851, c. 324, §§ 1-8; Me. Acts 1855, c. 189, §§ 1-10; N.H. Laws 1862, c. 2603, §§ 1-9.

11. These enactments are thoroughly treated in Comment, *A Compilation of Consent Provisions of Adoption Statutes*, 24 ROCKY MT. L. REV. 359 (1952).

12. Nugent v. Powell, 4 Wyo. 173, 33 P. 23 (1893). Parents do not have property rights but have rights correlative to and dependent upon fulfilling the parental duties. *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802 (1907); *Sullivan v. People*, 224 Ill. 468, 79 N.E. 695 (1906); *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922); *Hersey v. Hersey*, 271 Mass. 545, 171 N.E. 815 (1930). The moral and philosophical basis of this concept of rights and correlative duties is discussed in *Fischer v. Meader*, 95 N.J. 59, 111 A. 503 (1920). It was held in England that the father had rights superior to those of the mother of the child because it was he who fulfilled the parental duties. In *King v. Greenhill*, 4 Adol. & E. 624, 111 Eng. Rep. 922 (K.B. 1836), the child was taken from a capable mother and delivered to a libertine father on the basis of this notion. See 4 VERNIER, *AMERICAN FAMILY LAWS* 17 (1936).

13. *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802 (1907); *Stearns v. Allen*, 183 Mass. 404, 67 N.E. 349 (1903); *In re Adoption of Morrison*, 267 Wis. 625, 66 N.W. 732 (1954); *Shepard, Adoption Without Consent of Natural Parents*, 17 CASE & COM. 391, 395 (1911). In *Fischer v. Meader*, 95 N.J. 59, 111 A. 503 (1920), the court upheld the adoption of an abandoned child and founded the decision not upon the best interests of the child but upon the welfare of the state itself.

14. *Winans v. Luppig*, 47 N.J. Eq. 302, 305, 20 A. 969, 970 (1890); *In re Cohen's Adoption*, 155 Misc. 202, 279 N.Y. Supp. 427 (1935). The rights of the natural parents cannot be terminated by adoption merely because the adoptive parents would be better qualified to provide for the economic and temporal wellbeing of the child. *Jackson v. Russell*, 342 Ill. App. 637, 97 N.E.2d 584 (1951); *Cormack v. Marshall*, 211 Ill. 519, 71 N.E. 1077 (1904); *Matter of Livingston*, 151 App. Div. 1, 135 N.Y. Supp. 328 (1912). See *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922).

insufficient basis for a nonconsensual adoption.¹⁵

Abrogation of the necessity for consent of mentally ill parents in an adoption is, then, an extreme measure since it is a taking of the child against the will of the parent even though there has been no willful act, such as abandonment, to forfeit the parental rights. The need for such an extension of adoption policy was probably brought forth by the cases which held that mentally ill persons were not capable of consenting to an adoption.¹⁶ Attempts were made to have mental illness declared equivalent to abandonment but were unsuccessful because of a lack of intention to forego parental rights.¹⁷ This judicial interpretation made it evident that if the children of mentally diseased parents were to be adopted at all there had to be a statutory provision making unnecessary the consent of these persons in adoption proceedings. Such enactments are justified by the effects of failure to provide for the adoption of children of all mentally ill persons. In cases of permanent mental disease the child would be relegated to an institution during minority and permanently deprived of an opportunity to grow up in a home as a member of a family. Such a deprivation need not result from a curb on adoption of children whose parents are afflicted with a mental disease of limited duration.

Mental disorders can be categorized into three major groups which differ as to treatment, symptoms, and, most important for the present inquiry, in the response to treatment and possibility of recovery. These three major groups are mental deficiency,¹⁸ organic disorder,¹⁹ and

15. *Glass v. Bailey*, 118 N.E.2d 800 (Ind. 1954); *People ex rel. Dunlap v. New York Juvenile Asylum*, 58 App. Div. 133, 68 N.Y. Supp. 656 (1901). Unlike adoption, custody is temporary and does not affect the inheritance rights of the child. See *Jackson v. Russell*, 342 Ill. App. 637, 97 N.E.2d 584 (1951); *Hill v. Allabaugh*, 333 Ill. App. 602, 78 N.E.2d 127 (1948); Note, 2 Wis. L. Rev. 160 (1923). Visitation privileges for the natural parents, moreover, are a matter of right in custody proceedings. See, e.g., *Major v. Welch*, 122 N.E.2d 79 (Ind. 1954).

16. *Keal v. Rhydderck*, 317 Ill. 231, 148 N.E. 53 (1925); *Molin Adoption*, 34 Del. Co. 470 (Pa. 1946).

17. *State ex rel. Monroe v. Ford*, 164 La. 149, 113 So. 798 (1927); *Molin Adoption*, 34 Del. Co. 470 (Pa. 1946). There is no abandonment because there was neither an attempt to abandon nor to forego all parental rights. *Ibid.* But see *Sandine v. Johnson*, 188 Iowa 620, 176 N.W. 638 (1920).

18. Mental deficiency is a disorder which lasts from birth until death and in which the person affected has a mentality, or intelligence, considerably lower than the average person. In many cases the lack of intelligence is so pronounced that the person is unable to care for himself and, for his own personal safety, is kept in permanent confinement. There is not a great problem involved in the adoption of children whose parents are mentally deficient once the nature of the affliction is determined because of the permanent nature of the malady and the lack of possible improvement. However, there is an initial problem in determining that the person is a mental deficient and not merely afflicted with a temporary disorder which has symptoms similar to those of mental deficiency. For a thorough discussion of mental deficiency in non-psychiatric terminology see Jervis, *The Mental Deficiencies*, 286 ANNALS 25 (1953). For more technical discussions see LANDIS AND BOLLES, *TEXTBOOK OF ABNORMAL PSYCHOLOGY* c. 17

psychosis.²⁰

There is little regard for this tripartite classification in the adoption statutes. Ten states allow obviation of parental consent when the parent is "insane";²¹ ten others require only a previous adjudication of mental illness or of "insanity."²² However, there is a signal absence of appellate litigation of adoptions involving a mentally ill parent.²³ The constitutionality of a statute with such a provision was challenged recently in Illinois.²⁴ The statute, which was held not to contravene the due process clause of

(1950); NOYES, *MODERN CLINICAL PSYCHIATRY* c. 28 (1948).

19. Organic disorder is a situation in which there has been structural damage to the brain tissue caused by infection or physical injury. Since nerve tissue does not regenerate this variety of mental illness is permanent. See Weinstein, Alvord, and Rioch, *Disorders Associated with Disturbances of Brain Function*, 286 *ANNALS* 34 (1953); Strauss and Savitsky, *Head Injury: Neurologic and Psychiatric Aspects*, 31 *ARCH. NEUROL. & PSYCHIAT.* 893 (1934); LANDIS & BOLLES, *op. cit. supra* note 18, c. 13; NOYES, *op. cit. supra* note 18, c. 14.

20. The psychoses compose the largest of the three categories. They are a group of mental disorders which vary widely in effect on the patient's behavior and in response to treatment. These are such diseases as schizophrenia, manic depressive psychosis, and diseases of the senium. For a detailed listing of such disorders see NOYES, *op. cit. supra* note 18, at 123-25. The psychoneuroses may be grouped with the psychoses because they are both psychogenic and both generally not permanent although in each there may be certain cases which are lifelong. Psychoneuroses have been described as a link between the average mind and the psychotic personality. NOYES, *op. cit. supra* note 18, at 270. Among the psychoses and psychoneuroses there is not only a different possibility of recovery for each particular disorder, but there are great variances among individual cases suffering from the same affliction. To determine the permanence of the illness of any one individual requires more than a mere discerning of the classification of the malady; a study of the individual case is necessary. See Ginsburg, *The Neuroses*, 286 *ANNALS* 55 (1953); Lewis, *Criteria for Early Differential Diagnosis of Psychoneurosis and Schizophrenia*, 3 *AM. J. PSYCHOTHERAPY* 4 (1949); LANDIS & BOLLES, *op. cit. supra* note 18, c. 8-12; NOYES, *op. cit. supra* note 18, c. 23-27; *id.* at 40.

21. ALA. CODE tit. 27, § 3 (1940); ARK. STAT. ANN. § 56-106 (1947); GA. CODE ANN. § 74-404 (Supp. 1951); MO. ANN. STAT. § 453.040 (Vernon 1949); N.Y. DOM. REL. LAW § 111; N.D. REV. CODE § 14-1104 (Supp. 1953); ORE. COMP. LAWS ANN. § 109.320 (1940); R.I. GEN. LAWS c. 420, § 3 (1938). MISS. CODE ANN. § 1269 (1942) ("Mentally and/or morally unfit."); W. VA. CODE ANN. § 4755 (1949) (If both parents are insane.).

22. ARIZ. CODE ANN. § 27-203 (Supp. 1952); KY. REV. STAT. § 199.500 (1953); MICH. COMP. LAWS § 710.3 (1948); MINN. STAT. ANN. § 259.24 (West Supp. 1954); N.J. REV. STAT. § 9:3-24 (Supp. 1953); OHIO REV. CODE § 3107.06 (1954); S.D. CODE § 14.0403 (1939); TENN. CODE ANN. § 9572.21 (Williams Supp. 1952); WASH. REV. CODE § 26.32.040 (1951); WYO. COMP. STAT. ANN. § 58-211 (1945).

23. This is attributable to the paucity of such adoptions. Letter from John Warren Hill, Presiding Judge of Domestic Relations Court, City of New York, to *Indiana Law Journal*, March 18, 1955; letter from John M. Booth, Associate Judge of Juvenile Court, Providence, R.I., to *Indiana Law Journal*, March 31, 1955; letter from DeWitt S. Crow, Circuit Judge, Springfield, Ill., to *Indiana Law Journal*, March 16, 1955. About ten such cases a year occur in the Cleveland, Ohio, area. Letter from Walter T. Kinder, Presiding Judge, Probate Court of Cuyahoga County, Ohio, to *Indiana Law Journal*, March 15, 1955. Though there are few of these adoptions they are frequent enough to merit attention. If there are ten in one county, it is reasonable to assume that in the entire forty eight states the number is not insignificant.

24. People *ex rel.* Nabstedt v. Barger, 3 Ill.2d 511, 121 N.E.2d 781 (1954).

the Fourteenth Amendment, provides that the parent must have been mentally ill for a period of three years²⁵ and requires that two qualified physicians ascertain that the patient will not recover in the foreseeable future;²⁶ after these determinations, the court may appoint a guardian ad litem to represent the parent and consent to the adoption.²⁷

The battery of safeguards which Illinois provides is unique among the states. In but eight of the twenty-eight states allowing adoption against the will of a mentally diseased parent is there any specification that the illness be incurable.²⁸ Only one of these eight states, Illinois, requires a period of illness;²⁹ three states, not requiring an incurable affliction, insist on such a period.³⁰ A medical determination of the probable duration of the disease is required in but two states.³¹

Frequently the mental condition of the parent is to be determined by an agency, such as a state or county board of public welfare³² or a private child placing agency.³³ It is never specified that the agencies utilize psychiatric or even medical assistance in reaching their decision concerning the mental condition of the parent.³⁴ Some states require a written report of the agency³⁵ as a part of the court record, but many statutes lack any requirement to build a record of the hearing.³⁶ A few states pro-

25. ILL. ANN. STAT. c. 19, § 19.012(10 1/2) (Supp. 1953).

26. *Ibid.*

27. *Ibid.*

28. DEL. CODE ANN. tit. 13, § 1104 (Supp. 1954); ILL. ANN. STAT. c. 19, § 19.012(10 1/2) (Supp. 1953); IOWA CODE ANN. § 600.3 (Supp. 1954); ME. REV. STAT. c. 158, § 37 (1954); MASS. ANN. LAWS c. 210, § 3 (Supp. 1953); NEV. COMP. LAWS § 9478 (Supp. 1941); N.C. GEN. STAT. § 48-9 (Supp. 1953); PA. STAT. ANN. tit. 1, § 2 (Supp. 1954).

29. ILL. ANN. STAT. c. 19, § 19.012(10 1/2) (Supp. 1953).

30. ARK. STAT. ANN. § 56-106 (1947); KY. REV. STAT. § 199.500 (1953); WASH. REV. CODE § 26.32.040 (1951).

31. ILL. ANN. STAT. c. 19, § 19.012 (10 1/2) (Supp. 1953); PA. STAT. ANN. tit. 1, § 2 (Supp. 1954).

32. See, e.g., ALA. CODE tit. 27, § 2 (1940); DEL. CODE ANN. tit. 13, § 1107 (1953); GA. CODE ANN. § 74-410 (Supp. 1951); KY. REV. STAT. § 199.510 (1953); ME. REV. STAT. c. 158, § 37 (1954); MASS. ANN. LAWS c. 210, § 3A (Supp. 1953); MINN. STAT. ANN. § 259.27 (West Supp. 1954); S.D. CODE § 14.0406 (Supp. 1952); TENN. CODE ANN. § 9572.21 (Williams Supp. 1952).

33. See, e.g., MICH. COMP. LAWS § 710.5 (1948); WASH. REV. CODE § 26.32.090 (1951). It appears anomalous to permit an agency, actively interested in placing a child for adoption, to investigate the condition of the natural parents.

34. See notes 32, 33 *supra*.

35. See, e.g., ALA. CODE tit. 27, § 2 (1940); KY. REV. STAT. § 199.510 (1953); S.D. CODE § 14.0406 (Supp. 1952).

36. Ariz., Del., Ill., Ky., Me., Mass., Miss., Mo., N.J., N.Y., N.D., Ore., R.I., S.D., Tenn., Wash., W.Va., Wyo. But see IOWA CODE ANN. § 600.8 (1950); MICH. COMP. LAWS § 711 (1948); NEV. COMP. LAWS § 9482 (1929); OHIO REV. CODE § 3107 (1954); PA. STAT. ANN. tit. 1, § 4 (Supp. 1954).

vide for a guardian to "give or withhold consent" for the parent.³⁷ These guardians are court appointed, however, and are not required to champion actively the rights of the mentally ill parent.

The mere fact of "insanity" or that of commitment to or voluntary confinement in a mental institution, which are the standards for involuntary adoption in twenty states,³⁸ is an insufficient basis for permitting a permanent severance of the parental relationship. The standard for commitment to an institution for the mentally ill is, and should be, that a mental disease exists and is serious enough to warrant institutional treatment,³⁹ but the application of this same standard to adoption situations invites appalling results.⁴⁰ Such a standard permits the adoption of children against the will of a parent only temporarily afflicted with a mental illness. As adoption is permanent,⁴¹ the parent so afflicted would, upon recovery, be deprived of the child and the child would have been unnecessarily transferred from his natural family. Thus this extreme invasion of the parental interest also offends the interest of the child.⁴²

37. ILL. ANN. STAT. c. 19, § 19.012(10 1/2) (Supp. 1953); MICH. COMP. LAWS § 710.3 (1948); MINN. STAT. ANN. § 259.25 (West Supp. 1954); N.C. GEN. STAT. § 48-9 (Supp. 1953); OHIO REV. CODE § 3107.06 (1954); ORE. COMP. LAWS ANN. § 109.320 (1940); R.I. GEN. LAWS c. 420, § 3 (1938); TENN. CODE ANN. § 9572.21 (Williams Supp. 1952).

38. See notes 21, 22 *supra*.

39. See, e.g., MASS. ANN. LAWS c. 123, § 51 (Supp. 1954); MINN. STAT. ANN. § 525.753 (West Supp. 1954); N.Y. MENT. HYG. LAW § 70; NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL § 6 (rev. ed. 1952).

40. An example is the situation in *People ex rel. Strohsahl v. Strohsahl*, 221 App. Div. 86, 222 N.Y. Supp. 319 (1927). A father had been in a mental institution for three years; a year after his discharge from the hospital his son was adopted without the father's consent. The appellate court, in construing the statutory language "adjudicated to be insane," declared that at the time of the adoption the father, though discharged, had not yet been adjudged sane and, therefore, his consent was not necessary to perfect the adoption. This was despite the fact that at the time of the adoption there had been no statutory provision for an adjudication of sanity and that when such a statute was enacted, after the adoption but before the appeal, the father had acted promptly in obtaining a declaration of sanity.

41. See note 2 *supra*.

42. "Generally it is better for a child to remain with his natural parents as long as they wish to have him and do not abuse their powers. Even where temporary measures may be justified, a permanent change in legal status, although it may produce material advantages for the child, has intangible effects which are difficult to measure and foresee. Emotional attachments are not so easily severed as legal ties." 14 U. CHI L. REV. 303, 306 (1947). It is evident that an adverse psychological impact is more likely to result in children old enough to have developed substantial emotional attachments to their natural parents. Also, the degree of traumatic effect will vary with particular children. Martire and McCandless, *Psychological Aspects of the Adoption Process*, 40 IOWA L. REV. 350, 356. See Newbold, *Jurisdictional and Social Aspects of Adoption*, 11 MINN. L. REV. 605 (1927). The "popular conception . . . that well-to-do persons, wishing to share their good fortune, take a child to rear as their own" is contrasted with several cases of improperly motivated adoptive parents. *Id.* at 606-07. In DAVIDSON, *FORENSIC PSYCHIATRY* 96-97 (1952), having compared the relative merits of foster

It appears fundamental that to give effect to the underlying purpose of statutes making unnecessary the consent of a mentally ill parent such provisions should be limited in their application to parents whose illness is considered to be incurable. This standard is considerably more stringent than the standard for commitment to a mental institution,⁴³ just as adoption is more permanent in its effect than is commitment.

It is one matter to formulate a standard requiring that parental consent may be abrogated only if a parent's mental illness is incurable; it is quite another matter to establish a procedure by which this prognosis of no recovery may be fairly and accurately determined. Such a determination is a legal problem but is not capable of solution without recourse to information concerning the nature of mental illness.

The changing character of care of the mentally ill has done much to decrease the likelihood of incurability of any specific case of mental disease.⁴⁴ The entire philosophy of psychotherapy has been transformed from custodial to curative in recent years.⁴⁵ The treatments which are now most common, and, until very recently, most effective,⁴⁶ in mental hospitals were developed a relatively short time ago.⁴⁷

homes and orphanages in placing the child of a mentally ill parent, it is concluded that it requires a "nice psychiatric judgment [as to] whether, even with a psychotic background, the natural mother cannot, in the long run, provide the best care for her child." In *Risting v. Sparboe*, 179 Iowa 1133, 162 N.W. 592, 594 (1917), it was declared that "human experience has demonstrated that children ordinarily will be best cared for by those bound to them by the ties of nature, 'bone of their bone and flesh of their flesh.' . . . [T]he law raises a strong presumption that the child's welfare will be best subserved in the care and control of parents." See *In re McFarland's Guardianship*, 214 Iowa 417, 239 N.W. 702 (1931).

43. See note 40 *supra* and accompanying text.

44. "The last twenty-five years have brought about significant improvement in the end results of psychiatric treatment. The most striking finding is the shortened time that patients with recoverable mental illnesses need to spend in the hospital." Barton, *Hospital Services for the Mentally Ill*, 286 ANNALS 107, 109 (1953). See note 3 *supra*. See notes 45, 47 *infra*. Between 1940 and 1949 the percentage of annual discharges from mental institutions increased 36.0%, and during the same period the percentage of annual first admissions to institutions increased only 15.1%. NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, PATIENTS IN MENTAL INSTITUTIONS 1949 17 (Public Health Service Pub. No. 233, 1952).

45. This change of emphasis from the custodial aspects to the curative was "symbolized by the change in official institutional nomenclature from 'asylum' to 'hospital.' Newer institutions tended to cast off the forbidding external appearances that characterized most nineteenth century asylums." DEUTCH, *THE MENTALLY ILL IN AMERICA* 442-43 (1949). See Ross, *Hospitalization of the Voluntary Mental Patient*, 53 MICH. L. REV. 353 (1955). See note 3 *supra*.

46. See note 3 *supra*.

47. The efficacy of insulin in convulsive therapy was discovered in 1933, and the most familiar treatment, electric shock therapy, was first introduced in 1938. DEUTCH, *op. cit. supra* note 45, at 498-500. "Electric shock therapy produces significant improvement in states of tension and agitation, in depressions and in excitements. Insulin coma enhances the chance of recovery when used in the treatment of schizophrenic reactions." Barton, *op. cit. supra* note 44, at 108.

The difficulties in the task of determining the duration of the illness are compounded by the continuing development of treatments but even within the framework of currently known therapies such a diagnosis is a difficult task.⁴⁸ The patient's disorder must be classified in one of the three major groups—psychosis, mental deficiency, or organic disorder. Psychosis may be curable;⁴⁹ mental deficiency⁵⁰ and organic afflictions⁵¹ are usually permanent. It is clear that a more accurate prediction of duration of mental illness will emanate from an examination by a psychiatrist than by a physician.⁵² A physician has neither the training nor experience of a psychiatrist in diagnosing mental illness, and it is evident that a correct diagnosis as to type of disorder is essential to an accurate prediction of duration. Each advance in psychiatric knowledge, because of the specialized nature of care of the mentally ill, renders the ordinary physician relatively less able than a psychiatrist to make determinations of mental illness.

If the illness of the parent is determined by a psychiatrist to be one of the possibly temporary psychoses, there is still little basis for an immediate, accurate prognosis as to the duration of the infirmity. To make such a

48. "Every mental disorder is an individual problem which can be formulated only after a study of the whole personality, physical, mental, emotional and social, and of the evolution of these aspects of the particular personality." NOYES, *op. cit. supra* note 18, at 40. The diagnosis of organic disturbances is complicated by the fact that certain psychoses are similar in manifestation to organic disorders and sometimes arise after the same type injury that might cause an organic deficit. Schilder, *Psychic Disturbances After Head Injuries*, 91 AM. J. PSYCHIAT. 155 *Passim* (1934). "[T]he relationship of head trauma to the development of mental disorders often presents an important and difficult problem. Not infrequently the difficulty of this problem is increased by the fact that the clinical picture may become complicated by the addition of psychogenic symptoms to an organic syndrome. In order to arrive at an accurate diagnosis it is often necessary not only to make detailed mental and neurologic examinations but also to obtain a precise history of the patient's mental status prior to his injury." NOYES, *op. cit. supra* note 18, at 204. Mental deficiency is more readily recognized as such than is a psychosis. "In the idiots, imbeciles and even lower-grade morons the diagnosis of feeble-mindedness and a rough estimate of its extent are comparatively easy." *Id.* at 430. However, the unskilled may tend to err even here, as in *People ex rel. Nabstedt v. Barger*, 3 Ill.2d 511, 515, 121 N.E.2d 781, 783 (1954), the examining physician diagnosed the patient's disorder as mental deficiency; the psychiatrist established that no such affliction was present.

49. See note 20 *supra*.

50. See note 18 *supra*.

51. See note 19 *supra*.

52. It is generally conceded that psychiatry has advanced to the degree that a psychiatrist's determinations, as well as treatment, of mental illness are substantially more accurate than those of an ordinary physician. "Ideally, all medical judgments required by this Act should be made by fully qualified psychiatrists." NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL 18 (Public Health Service, Pub. No. 51, rev. ed. 1952). In utilizing a psychometric examination to determine whether or not a patient is feeble-minded "the conclusions reached by such examination are of little value unless it is performed by a trained, experienced individual." NOYES, *op. cit. supra* note 18, at 117.

prediction it is necessary to ascertain whether or not the individual responds to the available known treatments for the particular psychosis.⁵³ Such a course of active treatment and observation might take one or two years;⁵⁴ at the completion of the treatment a psychiatrist would be able to determine whether or not there had been any response. It would not be necessary for the patient completely to recover in a specified period of treatment, but after the period it would be possible to found a prediction, as to the permanence of the illness, on a basis more substantial than a mere period of prior disorder without active treatment.⁵⁵ If there is no favorable response to the known available treatments, the only chances for recovery are a spontaneous remission or the discovery of a new treatment; but after a mere prior period of illness, however long, it is possible that there might be a recovery if active treatment were initiated.⁵⁶ Therefore, a requirement of a prior period of disease without the further specification of active treatment is a relatively ineffective safeguard of parental rights.

The extent of any period must be limited by considerations of the welfare of the child. During any required period of mental illness or treatment the child may be in an institution, and, since by far the greatest demand for children is for infants and those only slightly older,⁵⁷ the

53. Interview with Eldred F. Hardtke, M.D., Clinical Psychiatrist and Acting Director of Psychological Clinic, Indiana University, March 2, 1955 (hereinafter cited as INTERVIEW).

54. One year is a reasonable length of time to observe a patient's reactions to available known treatments in the average state mental institution. *Ibid.* There is a plausible analogy between prefrontal lobotomy and nonconsensual adoptions of children of the mentally ill. Both are permanent and both involve determinations of the duration of the disorder. "[P]refrontal lobotomy . . . is a drastic and mutilating operation which should be considered only as a last resort. We certainly would not consider doing such an operation on a patient who had been here less than two years and on whom all of the otherwise available treatments had been tried unsuccessfully. I may add that in most of the relatively few cases in which we have operated the time elapsed has been a good deal longer than two years." Letter from Winfred Overholser, M.D., Superintendent, Saint Elizabeths Hospital, D.C., to the *Indiana Law Journal*, April 5, 1955, on file in Indiana University Law Library. Concerning the medical evidence in determining prospects of recovery Dr. Overholser stated: "[A] minimum of three years and perhaps even better five years of active treatment would be a desirable minimum." *Ibid.*

55. Interview, *supra* note 53.

56. *Ibid.* This must be tempered, however, with the fact that treatment is more effective when instituted early in the illness. Lewis, *op. cit. supra* note 20 *passim*. This judgment is fortified by the findings of a statistical analysis of persons suffering from various psychoses and the influence of the period of their illness prior to treatment on their recovery. Brannon and Graham, *Intensive Insulin Shock Therapy—A Five Year Survey*, 111 AM. J. PSYCHIAT. 659, 661-62 (1955).

57. Parents are chary of adopting a child who has formed previous emotional attachments and who may have been emotionally affected prior to adoption; on the other hand, very young babies are not always desired because there is no way of knowing if they will develop normally in mind and body. See Martire and McCandless, *op. cit.*

chances for adoption diminish with each year. Recent studies have pointed up the possible harm to children in remaining in an institution without maternal care.⁵⁸ This argues for a requirement of a period of active treatment and observation rather than a mere period of "insanity" because a determination of the duration of the illness by the latter method, in addition to its inaccuracy, would take considerably longer than the former. Where a diagnosis of the parent's disorder discloses mental deficiency or an organic deficit, both permanent afflictions, it might also be desirable to have a period of treatment, concurrent with an interlocutory adoption period, to test the accuracy of the diagnosis.

The singular nature of the procedures in adoption actions⁵⁹ raises certain considerations not involved in many other proceedings. Adoptions are considered confidential and it is usual to provide for private hearings and that any records be sealed and inaccessible to the public.⁶⁰ A complete record of an adoption is rarely expressly required by the controlling statutes.⁶¹ A strong analogy may be made between adoption and certain administrative proceedings inasmuch as in both it is incumbent upon the tribunal and not upon the parties alone, as in the usual adversary action, to produce the evidence upon which a ruling on the petition is to be based.⁶² The requirement of a record is a customary safeguard in administrative actions,⁶³ and would seem equally advisable in adoption proceedings.⁶⁴

supra note 42, at 359; Knight, *Some Problems Involved in Selecting and Rearing Adopted Children*, 5 BULLETIN OF THE MENNINGER CLINIC 65, 69 (1941).

58. "[T]here is a substantial and growing body of evidence, all of which points to the desirability of placing a child in a permanent home as early, chronologically, as possible." Martire and McCandless, *op. cit. supra* note 42, at 359-60. See Levy, *Observations of Attitudes and Behavior in a Child Health Center*, 41 AM. J. PUBLIC HEALTH 182 (1951).

59. The usual method of initiating adoption proceedings is by a petition. The party desiring to adopt the child petitions the court. Adoption is not an adversary proceeding and after the filing of the petition it is incumbent upon the court to determine the validity of the allegations in the pleadings; *e.g.*, any asserted mental illness of a natural parent. See 4 VERNIER, AMERICAN FAMILY LAWS § 257 (1936). In some states an agency is designated to perform this fact finding function. See notes 32, 33 *supra*.

60. See, *e.g.*, ALA. CODE tit. 27, § 5 (1940); DEL. CODE ANN. tit. 13, § 1108 (1953); ME. REV. STAT. c. 158, § 39 (1954); MO. ANN. STAT. § 453.040 (Vernon 1949); OHIO REV. CODE § 3107.14 (1954).

61. See note 36 *supra*.

62. See DAVIS, ADMINISTRATIVE LAW § 93 (1951). See, *e.g.*, 29 C.F.R. § 102.35 (1949). "It shall be the duty of the trial examiner to inquire fully into the facts. . . .

The trial examiner shall have authority . . . :

" . . .

"(j) To call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence." *Ibid*.

63. See DAVIS, *op. cit. supra* note 62, at § 88. Federal administrative agencies are required to maintain records of a rather complete nature. Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007 (1952).

64. A complete record is required by several statutes authorizing sterilization of mental deficients. "The said board shall preserve and keep all record evidence offered

It may be argued in the case of adoption that the secret nature of the proceedings is an additional reason why it should be necessary to build a written record. The prime requirement for the building of a record should be that the court receive and retain written reports from psychiatrists that the prescribed methods of determining the permanence of the mental illness have been satisfied.

Such a requisite, however, would offer but little more protection to the parent than a naked specification that the order be based on the opinion of a psychiatrist. For in each situation it is entirely possible that the only party opposed to the adoption may be incarcerated in a mental institution.⁶⁵ In the *Barger* case a guardian ad litem was appointed to represent the interests of the mentally ill parent,⁶⁶ but such an appointment is permissive and may not be made until the medical testimony has been obtained;⁶⁷ the actual role of the court appointed guardian, therefore, is to consent to the adoption. An attorney, if appointed counsel for the parent immediately upon the filing of the petition, could do much to assure the building of a sufficient record. His role should not be to make determinations or assertions as to the seriousness of the mental illness nor to consent to the adoption, but rather to assume the interests of the parent and make certain that the prescribed statutory requirements are fulfilled. The necessity for a complete written record is underscored by the difficulties which the parent, upon recovery, would encounter were no such record required in attempting to demonstrate on appeal the negative proposition that the court did not have sufficient evidence to find the mental disease incurable.

It is possible to make a cogent constitutional argument for the tempering of the present adoption statutes with these suggested reforms. The foundation of any such argument will necessarily be the nature of the rights of the parents to retain their relationship to their children. This

at such hearings and shall have reduced to writing in duplicate all oral evidence so heard, to be kept with its records." N.H. REV. LAWS c. 160, § 5 (1942). See, e.g., GA. CODE ANN. § 99-1309 (1955); IDAHO CODE ANN. § 66-804 (1949); N.C. GEN. STAT. § 35-53 (1950); N.D. REV. CODE § 23-0813 (1943); ORE. COMP. LAWS ANN. § 436.080 (1953); S.C. CODE § 32-674 (1952).

65. If the obviation of the consent of the disordered person is in issue the consent or deace of the other parent may be assumed. It is entirely possible that the child's other relatives might be as interested in adopting the child as in protecting the parent's rights. See *People ex rel. Strohsahl v. Strohsahl*, 221 App. Div. 86, 222 N.Y. Supp. 319 (1927).

66. *People ex rel. Nabstedt v. Barger*, 3 Ill.2d 511, 514, 121 N.E.2d 781, 782 (1954).

67. ILL. ANN. STAT. c. 19, § 19.012(10 1/2) (Supp. 1953).

parental interest has long been established as a "natural right,"⁶⁸ and is clearly within the definition of liberty granted protection by the due process clause of the fourteenth amendment.⁶⁹ An invasion, far less serious than the one involved in adoption, was thwarted by the court as an unwarranted invasion of the right to "marry, establish a home and bring up children."⁷⁰ It has been judicially remarked that, though natural, these rights are not absolute, that they may be subjugated to the welfare of the child;⁷¹ but a court might well have added that no right is absolute.⁷² To be valid, an impairment of such natural rights must be justified by its tendency to further an urgent public interest.⁷³

68. "A natural affection between the parents and offspring, though it may be naught but a refined animal instinct, and stronger from the parent down than from the child up, has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed." *Lacher v. Venus*, 177 Wis. 558, 569-70, 188 N.W. 613, 617 (1922). "[T]he right of the natural parents to the custody of their children . . . has ever been regarded, even in primitive civilizations, as one of the highest of natural rights." *Matter of Livingston*, 151 App. Div. 1, 7, 135 N.Y. Supp. 328, 332 (1912). See *Stearns v. Allen*, 183 Mass. 404, 67 N.E. 349 (1903); *State ex rel. Monroe v. Ford*, 164 La. 149, 113 So. 798 (1927); *In re Cohen's Adoption*, 155 Misc. 202, 279 N.Y. Supp. 427 (1935); *Jackson v. Russell*, 342 Ill. App. 637, 97 N.E.2d 584 (1951). The importance given natural rights, as such, is the result of more than a mere climate of opinion; natural rights formed a basic part of the Declaration of Independence and the spirit of the new republic. Jefferson acknowledged the importance of these rights by giving import to "certain unalienable rights." 1 PAPERS OF THOMAS JEFFERSON 429 (Boyd ed. 1950). The philosophical origin of this concept is discussed in DUMBAULD, *THE DECLARATION OF INDEPENDENCE* (1950); BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS*, passim (1932).

69. The Supreme Court of the United States, in discussing the liberty guaranteed by the Fourteenth Amendment, stated that "the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to . . . marry, establish a home and bring up children . . . and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In discussing a state statute which required children to attend public schools, rather than parochial, the Court declared: "Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state." *Pierce v. Society of Sisters of the Holy Names*, 268 U.S. 510, 534-35 (1925). That was the right protected in *Meyer v. Nebraska*, *supra*, is the same right involved in adoption proceedings was recognized in *Sinquefield v. Valentine*, 159 Miss. 144, 132 So. 81 (1931). Noted in 5 So. CALIF. L. REV. 161 (1931).

70. *Meyer v. Nebraska*, *supra* note 69. The statute held unconstitutional forbade the teaching of the German language in the schools of the state.

71. See *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802 (1907); *In re Adoption of Morrison*, 267 Wis. 625, 66 N.W. 732 (1954); *Schlitz v. Roenitz*, 86 Wis. 31, 56 N.W. 194 (1893); *Sullivan v. People*, 224 Ill. 468, 79 N.E. 695 (1906).

72. Even the right to life itself is, in capital cases, conditional.

73. The concept that there must be a rational bearing between the means of regulation and the purpose of the exercise of power has been well expressed by Mr. Justice Frankfurter: "It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional

Such an impairment of parental rights as nonconsensual adoption involves the notions of both substantive and procedural due process. The opinion in the *Barger* case discussed the problem in terms of substantive due process,⁷⁴ but, by its discussion of the adequacy of the methods which the statute provided to determine the permanence of illness, it gave implied recognition to the procedural due process aspects of the problem.⁷⁵

It would be difficult to form a convincing constitutional argument opposing the obviation of the consent of parents afflicted with an incurable mental illness. The public interest in the child permanently deprived of any home and family would clearly be urgent enough to override the private interest of the parent, even though that private interest is in the nature of a natural right. Were the parent afflicted with a disease of a temporary nature, however, the welfare of the child, which the public interest seeks to further, would not best be served by an adoption. The deleterious effects of an unnecessary adoption, though often overlooked, are well established.⁷⁶

An argument founded on the importance of the parental right, however convincing alone, is enforced by the notion that when the illness is temporary there is no public interest in the adoption of the child to override the vigorous private interest of the parent. A statute which makes parental consent to an adoption unnecessary solely because the parent is presently mentally ill or "insane," without regard for the future duration of the illness appears violative of substantive due process.

But a statutory requirement that the mental illness be incurable accomplishes nothing in the absence of procedures to assure that the seriousness of the disorder be adequately and accurately determined by the court. The rights of the parent are entitled to protection by the procedural, as well as the substantive, notion of due process. Diligent protection of the right to retain one's children is, as guarding a natural right of fundamental importance in a democratic society, within the intended scope of "the scheme of ordered liberty" described in *Palko v. Connecticut*.⁷⁷ When, by a failure to provide adequate procedural safeguards, such vital individual rights are invaded, with no corresponding benefit in the public interest, there is a patent violation of the procedural guaranties of the due process clause.

life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession." *Barsky v. Board of Regents of the University of the State of New York*, 347 U.S. 442, 470 (1954) (Dissent).

74. *People ex rel. Nabstedt v. Barger*, 3 Ill.2d 511, 516, 121 N.E.2d 781, 783 (1954).

75. *People ex rel. Nabstedt v. Barger*, 3 Ill.2d 511, 516-17, 121 N.E.2d 781, 784 (1954).

76. See note 42 *supra*.

77. 302 U.S. 319, 325 (1937).

The states currently do not provide adequate safeguards in such adoption proceedings. A psychiatric examination, a period of prior treatment for the affliction, the necessity of the court to build a written record, and an actual representation of the interests of the parent are minimum requirements. Substantially more safeguards are commonly found in statutes authorizing sterilization of mental deficient,⁷⁸ a step no more final than and involving the same individual right as nonconsensual adoption.⁷⁹

The need for reforming adoption statutes to incorporate the suggested safeguards is sustained by a ubiquitous lack of consideration for the mentally ill in the adoption statutes. In attempting to support the welfare of children the states have expanded nonconsensual adoptions to a point where, with no substantial benefit to the children, the natural rights of mentally ill parents have been critically impaired. These persons are fairly entitled to the benefit of those substantive and procedural safeguards which will best prevent such an impairment of their natural rights.

78. Statutes authorizing sterilization involve elaborate medical examinations to determine the nature of the illness of the patient. See, *e.g.*, IDAHO CODE ANN. § 66-803 (1949); IOWA CODE ANN. § 145.1 (Supp. 1954); KAN. GEN. STAT. § 76-151 (1949); MONT. REV. CODES ANN. § 38-603 (1947); N.C. GEN. STAT. § 35-40 (1950); ORE. COMP. LAWS ANN. § 436.050 (1953); S.C. CODE § 32-671 (1952). Two states provide for a psychiatric examination. DEL. CODE ANN. tit. 16, § 5701 (1953); WIS. STAT. § 46.12 (1953). There is sometimes provision for representation by counsel or guardian at the hearing. KAN. GEN. STAT. § 76-149 (1949); S.C. CODE § 32-673 (1952). A right of appeal to the supreme court of the state is sometimes provided. See, *e.g.*, N.H. REV. LAWS c. 160, § 7 (1942); ORE. COMP. LAWS ANN. § 436.130 (1953); UTAH CODE ANN. § 64-10-10 (1953); VA. CODE § 37-224 (1950). The requirement to build a written record in the hearing is common in sterilization statutes. See note 64 *supra*.

79. There is but superficial merit in any assertion that the right impaired by sterilization differs substantially from that involved in adoption in that the physical body of the parent, in adoption, is not altered. The impact of such an argument is checked by the recognition that the impairment of activities wrought by the operations specified in the statutes is confined to procreation and does not extend to the sex activities which would be affected by castration. Another factor not immediately evident is that a sterilization is often beneficial to the person whose rights are involved in that the operation may allow him to be released from confinement and return to society. This fact was one of the primary reasons presented when the Supreme Court of the United States declared that sterilization of mental deficient did not contravene the due process clause. *Buck v. Bell*, 274 U.S. 200, 205-206 (1927). It is significant that in the adoption proceeding there is no such benefit which flows to the mentally ill parent to mitigate the loss incurred. Even the nature of the loss itself seems greater in the adoption situation inasmuch as the children of whom there is a deprivation, unlike in sterilization, are more than mere abstractions. They are living persons with whom the parent has had an opportunity to develop an attachment founded on the love and affection which naturally find fruition in the relationship of parent and child.